No. 76-1640

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHNEY BOWMAN KEARNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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JOHNEY BOWMAN KEARNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 5, 1976, petitioner pleaded *nolo contendere* in the United States District Court for the District of Arizona to one count of wire fraud, in violation of 18 U.S.C. 1343.[1] He was sentenced to three years' imprisonment. The court of appeals affirmed on February 14, 1977 (Pet. App. 1-3). The petition for a writ of certiorari was not filed until April 18, 1977, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no merit to petitioner's contentions.

1. Petitioner contends (Pet. 4-5) that his conviction based upon a plea of *nolo contendere* should be reversed because the indictment failed to charge a federal offense.

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[1]Petitioner made restitution to each person defrauded (Tr. 10). The remaining six counts of the indictment were dismissed on the government's motion.

Count VII, to which petitioner pleaded *nolo contendere*, alleged that "in the District of Arizona, and elsewhere," petitioner devised a scheme to defraud "Loraine Kilts of Detroit, Michigan"; that, pursuant to this scheme, petitioner "[b]y various telephone conversations" with Ms. Kilts, arranged to meet with and sell to her an exclusive license agreement for the manufacture and sale of metal tags imprinted with the wearer's name and a toll-free telephone number through which (in the event of accident or illness) medical information about the wearer could be obtained from a computer maintained by petitioner; that petitioner agreed to furnish Kilts with equipment for the manufacture of the tags, to promote the business, and to forward to her orders from customers and her share of the profits; and that, after Kilts made a partial payment of $1,250 to petitioner for the license, she neither received the equipment nor saw or heard from him again. Count VII concluded by charging that petitioner's conduct violated the wire fraud statute, 18 U.S.C. 1343. It did not, however, use the word "interstate" in describing the telephone communications alleged to have been in furtherance of the fraud.[2]

Petitioner raised the issue of the failure of Count VII to allege the interstate element[3] for the first time on appeal. Although an indictment may be challenged for failure to state an offense at any time during the proceedings (Fed. R. Crim. P. 12(b)(2)), it is well settled

[2]Each of the remaining six counts of the indictment, which were dismissed upon petitioner's plea of *nolo contendere* to Count VII, alleged that petitioner had employed the same scheme, through "various telephone conversations," to defraud other victims residing in Michigan, Idaho, Alabama and North Carolina.

[3]As petitioner notes, use of wire or other communication facility in interstate commerce is an essential element of the offense defined by Section 1343.

that an indictment questioned for the first time on appeal will be held sufficient "unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." *United States* v. *Trollinger*, 415 F. 2d 527, 528 (C.A. 5). See also, *e.g.*, *United States* v. *Knippenberg*, 502 F. 2d 1056, 1061 (C.A. 7). As this Court has stated, with regard to a challenge first made after a verdict of guilty had been rendered: "[N]o prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." *Hagner* v. *United States*, 285 U.S. 427, 433.

Petitioner does not claim that he was misled by the language used in the indictment—for example, by suggesting to him that it was irrelevant whether his telephone calls to Ms. Kilts were local or interstate. In those circumstances, the only inquiry is whether the indictment may fairly be construed as alleging that petitioner placed interstate telephone calls in connection with his scheme. In this case, the indictment stated that petitioner employed "various telephone conversations" with Loraine Kilts "of Detroit, Michigan" to carry out a scheme that he devised and executed "in the District of Arizona, and elsewhere."[4] This was, we submit, a sufficient allegation of the interstate element that "fairly inform[ed] [petitioner] of the charge against which he must defend, and

[4]It has been held than an indictment that fails to allege all the elements of an offense required by statute will not be saved simply by citing the statutory section relied upon in bringing the indictment. See, *e.g.*, *United States* v. *Berlin*, 472 F. 2d 1002, 1008 (C.A. 2), certiorari denied, 412 U.S. 949. In the present case, however, there was language in addition which could reasonably be read to allege the occurrence of interstate telephone calls in furtherance of the fraudulent scheme.

* * * [will] enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117.

The present case therefore involves only the application of settled principles to a particular set of facts, and does not merit review by this Court.

2. Petitioner's contention (Pet. 5-6) that the trial court, before accepting the plea of *nolo contendere*, failed to satisfy itself that there was a factual basis for the claim that petitioner used a telephone in interstate commerce, is wholly without merit. At the plea hearing, Count VII was read aloud to petitioner, whereupon FBI Agent Hunt described the government's proof as to petitioner's fraud. He stated that Ms. Kilts became involved in petitioner's scheme by responding to an advertisement in her "local" Michigan newspaper, which listed a toll-free number in Tempe, Arizona. Thus the court was satisfied that there was a factual basis for each of the elements of the offense, including that of a telephone call in interstate commerce (Tr. 14-17).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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